

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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JERALD REY COSTA, JR.,

Case No. 3:16-cv-00705-HDM-CLB

Petitioner,

v.

ORDER

JOHN HENLEY,<sup>1</sup> *et al.*,

Respondents.

Before the court for a decision on the merits is a petition for writ of habeas corpus under 28 U.S.C. § 2254 (ECF No. 14) filed by Jerald Rey Costa, Jr., a Nevada prisoner. For the reasons discussed below, this court denies the petition.

**I. BACKGROUND**

In August 2010, Costa was charged with murder with use of a firearm based on an allegation that, in May 2010, he shot Anthony Pulice with a handgun in a bar in Sparks, Nevada. Costa was subsequently charged with battery by a prisoner for allegedly striking and biting another inmate after learning that Pulice had died from his wounds. In July 2011, Costa entered negotiated guilty pleas to first-degree murder and the battery in the Second Judicial District for Nevada (Washoe County). Judgments of conviction were entered in August 2011, sentencing him to life with the possibility of

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<sup>1</sup> John Henley, the current warden of Northern Nevada Correctional Center, is substituted for Isidro Baca as the primary respondent in this case. See Fed. R. Civ. P. 25(d).

1 parole after 20 years for the murder and a consecutive term of 2 to 6 years for the  
2 battery. Costa appealed. In May 2012, the Nevada Supreme Court affirmed the  
3 judgments.

4 In January 2014, Costa filed a counseled supplemental state petition for writ of  
5 habeas corpus, seeking post-conviction relief. After holding an evidentiary hearing, the  
6 state district court held denied the petition. Costa appealed. In November 2016, the  
7 Nevada Supreme Court affirmed the denial of Costa's petition.

8 In late 2016, Costa submitted his original federal habeas petition. This Court  
9 stayed this matter while Costa sought relief in state court. During the stay, Costa filed a  
10 pro per state habeas petition, a motion to vacate his judgment of conviction, a motion  
11 for a new sentencing hearing, and a motion to reconsider sentence, all of which were  
12 denied.

13 In May 2022, this court reopened this case at Costa's request and, soon  
14 thereafter, Costa filed an amended petition. This court subsequently granted, in part,  
15 respondents' motion to dismiss and dismissed Ground 1 from the amended petition.  
16 The court now addresses Costa's remaining claims.

## 17 **II. STANDARDS OF REVIEW**

18 This action is governed by the Antiterrorism and Effective Death Penalty Act  
19 (AEDPA). The standard of review under AEDPA is set forth at 28 U.S.C. § 2254(d):

20 An application for a writ of habeas corpus on behalf of a person in custody  
21 pursuant to the judgment of a State court shall not be granted with respect to any  
22 claim that was adjudicated on the merits in State court proceedings unless the  
adjudication of the claim –

23 (1) resulted in a decision that was contrary to, or involved an  
unreasonable application of, clearly established Federal law, as determined by  
24 the Supreme Court of the United States; or

25 (2) resulted in a decision that was based on an unreasonable  
determination of the facts in light of the evidence presented in the State court  
26 proceeding.

1 A decision of a state court is “contrary to” clearly established federal law if the  
2 state court arrives at a conclusion opposite than that reached by the Supreme Court on  
3 a question of law or if the state court decides a case differently than the Supreme Court  
4 has on a set of materially indistinguishable facts. *Emil v. Taylor*, 529 U.S. 362, 405-06  
5 (2000). An “unreasonable application” occurs when “a state-court decision  
6 unreasonably applies the law of [the Supreme Court] to the facts of a prisoner’s case.”  
7 *Id.* at 409. “[A] federal habeas court may not” issue the writ simply because that court  
8 concludes in its independent judgment that the relevant state-court decision applied  
9 clearly established federal law erroneously or incorrectly.” *Id.* at 411.

10 The Supreme Court has explained that “[a] federal court’s collateral review of a  
11 state-court decision must be consistent with the respect due state courts in our federal  
12 system.” *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). The “AEDPA thus imposes a  
13 ‘highly deferential standard for evaluating state-court rulings,’ and ‘demands that state-  
14 court decisions be given the benefit of the doubt.’” *Renico v. Lett*, 559 U.S. 766, 773  
15 (2010) (quoting *Lindh v. Murphy*, 521 U.S. 320, 333, n.7 (1997); *Woodford v. Viscotti*,  
16 537 U.S. 19, 24 (2002) (per curiam)). “A state court’s determination that a claim lacks  
17 merit precludes federal habeas relief so long as ‘fairminded jurists could disagree’ on  
18 the correctness of the state court’s decision.” *Harrington v. Richter*, 562 U.S. 86, 101  
19 (2011) (citing *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). The Supreme Court  
20 has emphasized “that even a strong case for relief does not mean the state court’s  
21 contrary conclusion was unreasonable.” *Id.* (citing *Lockyer v. Andrade*, 538 U.S. 63, 75  
22 (2003)); see also *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (describing the AEDPA  
23 standard as “a difficult to meet and highly deferential standard for evaluating state-court  
24 rulings, which demands that state-court decisions be given the benefit of the doubt”)  
25 (internal quotation marks and citations omitted).

26 “[A] federal court may not second-guess a state court’s fact-finding process  
27 unless, after review of the state-court record, it determines that the state court was not  
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1 merely wrong, but actually unreasonable.” *Taylor v. Maddox*, 366 F.3d 992, 999 (9th  
2 Cir. 2004); *see also Miller-El*, 537 U.S. at 340 (“[A] decision adjudicated on the merits in  
3 a state court and based on a factual determination will not be overturned on factual  
4 grounds unless objectively unreasonable in light of the evidence presented in the state-  
5 court proceeding, § 2254(d)(2).”).

### 6 **III. DISCUSSION**

#### 7 *Ineffective assistance of counsel claims*

8 Except for Ground 4, all of Costa’s remaining claims allege that he was deprived  
9 of effective assistance of counsel in violation of his constitutional rights. The right to  
10 counsel embodied in the Sixth Amendment provides “the right to the effective  
11 assistance of counsel.” *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (quoting  
12 *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)). In *Strickland*, the U.S.  
13 Supreme Court held that an ineffective-assistance claim requires a petitioner to show  
14 that: (1) his counsel’s representation fell below an objective standard of reasonableness  
15 under prevailing professional norms in light of all of the circumstances of the particular  
16 case; and (2) it is reasonably probable that, but for counsel’s errors, the result of the  
17 proceeding would have been different. *Strickland*, 466 U.S. at 690, 694. When an  
18 ineffective assistance of counsel claim bears on a defendant’s decision to enter a guilty  
19 plea, the petitioner must demonstrate that “there is a reasonable probability that, but for  
20 counsel’s errors, he would not have pleaded guilty and would have insisted on going to  
21 trial.” *Hill v. Lockhart*, 474 U.S. 52, 59 (1985) (citations omitted). The reviewing court  
22 need not consider the performance component before the prejudice component “or  
23 even address both components of the inquiry if the defendant makes an insufficient  
24 showing on one.” *Id.* at 697.

#### 25 **Ground 2(1)**

26 In Ground 2(1), Costa alleges that he was deprived of effective assistance of  
27 counsel in violation of his rights under the Sixth and Fourteenth Amendment because  
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1 his counsel, Jennifer Lunt, failed to investigate whether he lacked the requisite intent to  
2 commit first-degree murder. According to Costa, he was experiencing an alcoholic  
3 blackout at the time of the shooting. He further alleges that, in addition to the alcoholic  
4 blackout, he had not been taking his medication for other mental health conditions.

5 The Nevada Supreme Court addressed the claim raised in Ground 2(1) as  
6 follows:

7 Costa argues that trial counsel failed to advise him that he had a  
8 viable defense based on voluntary intoxication. Counsel testified that a  
9 percipient witness reported that the victim was nearly passed out on a bar  
10 when Costa stood up, announced that he was going to shoot the victim,  
11 and then shot the victim four times. Counsel further testified that Costa's  
12 actions after the shooting suggested that voluntary intoxication would not  
13 have been a viable defense. The district court found counsel's testimony  
14 to be credible and correctly concluded that the events described  
15 demonstrated the intent necessary for first-degree murder. *See Byford v.*  
16 *State*, 116 Nev. 215, 237, 994 P.2d 700, 714 (2000) ("Premeditation . . .  
17 may be as instantaneous as successive thoughts of the mind."). Based on  
18 those findings and conclusions, Costa failed to show deficient  
19 performance or prejudice. The district court therefore did not err in denying  
20 this claim.

21 ECF No. 20-47 at 3-4.

22 Costa has failed to demonstrate that this decision was based on an  
23 unreasonable application of Supreme Court precedents or on an unreasonable  
24 determination of the facts in light of the evidence presented in the state court  
25 proceeding. The court's findings of fact are supported by Lunt's testimony at the  
26 evidentiary hearing on Costa's state habeas petition. *See* ECF No. 20-26 at 9-12. Lunt  
27 testified that she talked to witnesses at the scene including Costa and Pulice's  
28 roommate, who provided the account related in the court's opinion. *Id.* at 12. Lunt also  
testified that she "had Dr. Anderson who worked at the Washoe County Crime Lab  
extrapolate back the blood alcohol based upon what it was when [Costa] was booked  
and what it would have been at the time of the shooting." *Id.* at 9. According to her  
testimony, the results of that testing combined with Costa's actions after the shooting

1 led her to conclude that his impairment due to alcohol would not be “a viable defense.”  
2 *Id.*

3 The Nevada Supreme Court correctly applied the *Strickland/Hill* standard to the  
4 claim. *Id.* at 2. This court must defer to the state supreme court’s decision because it  
5 was not “so lacking in justification that there was an error well understood and  
6 comprehended in existing law beyond any possibility for fairminded disagreement.”  
7 *Richter*, 562 U.S. at 103. Thus, Ground 2(1) is denied.

8 Ground 2(2)

9 In Ground 2(2), Costa alleges that he was deprived of effective assistance of  
10 counsel in violation of his rights under the Sixth and Fourteenth Amendment because  
11 Lunt failed to investigate whether Pulice had pulled a knife on him before he shot Pulice.  
12 Costa claims that he told the police at the time of his arrest, and later Lunt, that he  
13 believed Pulice had brandished a knife. He also claims that Pulice’s friend was alone  
14 with the body before the police arrived, implying that the friend may have taken the  
15 knife.

16 It does not appear that Costa presented this claim to the Nevada Supreme Court  
17 when he appealed the district court’s denial of post-conviction relief. See ECF No. 20-  
18 43. Thus, the claim is arguably unexhausted. See *Baldwin v. Reese*, 541 U.S. 27, 29  
19 (2004) (holding that a habeas petitioner must present his claim “to each appropriate  
20 state court (including a state supreme court with powers of discretionary review)” to  
21 meet the exhaustion requirement). Even so, “[a]n application for a writ of habeas corpus  
22 may be denied on the merits, notwithstanding the failure of the applicant to exhaust the  
23 remedies available in the courts of the State.” 28 U.S.C. § 2254(b)(2); see *Cassett v.*  
24 *Stewart*, 406 F.3d 614, 624 (9th Cir. 2005) (“[A] federal court may deny an unexhausted  
25 petition on the merits only when it is perfectly clear that the applicant does not raise  
26 even a colorable federal claim.”). As explained below, Ground 2(2) is not a colorable  
27 federal claim.  
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1 Lunt testified that Costa maintained “almost from the beginning that Mr. Pulice  
2 had a knife and had come at him with that.” ECF No. 20-26 at 12. However, according  
3 to her testimony, she talked to witnesses at the scene but was unable to develop any  
4 evidence to prove that a knife existed. *Id.* As mentioned above, the roommate told her  
5 that Pulice was “kind of passed out on the bar” when Costa shot him. *Id.* In addition, no  
6 knife was taken into evidence by the police, and, while Pulice was known to carry a  
7 knife, the roommate said that Pulice’s knife had gone missing a week or so before the  
8 shooting. *Id.* at 13.

9 “The petitioner carries the burden of proving by a preponderance of the evidence  
10 that he is entitled to habeas relief.” *Davis v. Woodford*, 384 F.3d 628, 638 (9th Cir.  
11 2004) (citing *Silva v. Woodford*, 279 F.3d 825, 835 (9th Cir.2002)). Here, Costa has not  
12 presented any evidence in the state court or in this court that Pulice threatened him with  
13 a knife prior to the shooting. Accordingly, his claim that his counsel provided ineffective  
14 assistance of counsel by failing to investigate the matter is wholly unsubstantiated.  
15 Thus, Ground 2(2) is denied as plainly meritless under 28 U.S.C. § 2254(b)(2).

16 Ground 2(4)<sup>2</sup>

17 In Ground 2(4), Costa alleges that he was deprived of effective assistance of  
18 counsel in violation of his rights under the Sixth and Fourteenth Amendment because  
19 his counsel “took advantage of [his] mental health illness and coerced him into pleading  
20 guilty to a charge he was not capable of possessing the requisite intent to commit.” ECF  
21 No. 14 at 6. He claims that Lunt told him that making amends for the crime would  
22 benefit his mental health and that he would receive the death penalty if he did not plead  
23 guilty.

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26 <sup>2</sup> Rather than constitute identifiable ineffective assistance of counsel (IAC) claims, Costa’s  
27 allegations labeled Ground 2(3) and Ground 3 merely supplement the grounds for relief discussed  
28 in this order. Thus, those allegations are not addressed herein as separate claims.

1 The Nevada Supreme Court addressed the claim raised in Ground 2(4) as  
2 follows:

3 Costa argues that counsel coerced him into pleading guilty by  
4 telling him that he could face the death penalty. Trial counsel testified,  
5 however, that she and Costa never discussed the death penalty. The  
6 district court found that trial counsel was credible and that Costa's  
7 testimony was not credible. We will not second-guess those credibility  
8 determinations. *State v. Rincon*, 122 Nev. 1170, 1177, 147 P.3d 233, 238  
9 (2006). Costa failed to show deficient performance. The district court  
10 therefore did not err in denying this claim.

11 ECF No. 20-47 at 3.

12 Costa has failed to demonstrate that this decision was based on an  
13 unreasonable application of Supreme Court precedents or on an unreasonable  
14 determination of the facts in light of the evidence presented in the state court  
15 proceeding. Lunt testified that, by the time she took over the case, the statutory period  
16 for the State to seek the death penalty had elapsed so she instead focused her  
17 discussions with Costa on the possibility that he could be sentenced to life in prison  
18 without the possibility of parole. See ECF No. 20-26 at 11. She further testified that she  
19 never told Costa that he was subject to the death penalty and that she would have told  
20 him that it was "not even on the table" if he had brought it up. *Id.* at 19. By pleading  
21 guilty, Costa received the earliest possible parole eligibility for first-degree murder. See  
22 Nev. Rev. Stat. § 200.030. In addition, the State agreed to not seek a mandatory  
23 consecutive enhancement term for use of a deadly weapon. ECF No. 19-18 at 4.

24 Here again, the Nevada Supreme Court correctly applied the *Strickland/Hill*  
25 standard to the claim. *Id.* at 2. Given Lunt's testimony and the significant benefit Costa  
26 received in exchange for his guilty plea, the record does not support a finding that  
27 counsel improperly coerced him into pleading guilty or that, but for counsel's alleged  
28 improper conduct, Costa would have insisted on going to trial. Thus, this court must  
defer to the state supreme court's decision because it was not "so lacking in justification  
that there was an error well understood and comprehended in existing law beyond any



possibility for fairminded disagreement.” *Richter*, 562 U.S. at 103. Thus, Ground 2(4) is denied.

### Ground 2(5)

In Ground 2(5), Costa alleges that he was deprived of effective assistance of counsel in violation of his rights under the Sixth and Fourteenth Amendment because his counsel failed to have him independently evaluated to determine whether he had “the requisite state of mind to commit the crime charged, or to determine whether he had the requisite state of mind to plead guilty to such.” ECF No. 14 at 6. Other than referring vaguely in his petition to his mental health issues and being prescribed psychotropic medication, Costa does not elaborate on this claim.

The Nevada Supreme Court addressed Costa’s competency at the time of his guilty claim as follows:

Costa argues that counsel failed to inform the district court that Costa was abused as a child and suffered from several mental illnesses, so that the district court could fully evaluate his competency. At the evidentiary hearing, Costa presented no evidence that he was incompetent to enter his guilty plea. Rather, Costa’s responses during his guilty plea colloquy as well as counsel’s testimony regarding her interactions with Costa and the results of two competency evaluations support the district court’s finding that Costa understood the charges against him and was an active participant in his defense, indicating that Costa was competent to enter his plea. See *Calvin v. State*, 122 Nev. 1178, 1182–83, 147 P.3d 1097, 1100 (2006) (setting forth the competency standard). Accordingly, Costa failed to show deficient performance or prejudice. The district court therefore did not err in denying this claim.

ECF No. 20-47 at 3.

According to Lunt’s testimony at the state post-conviction hearing, an evaluation conducted before she took the case over from Costa’s prior counsel resulted in a finding that Costa was competent at the time of the evaluation. ECF No. 20-26 at 8, 17. After Costa entered his guilty plea, Lunt had him evaluated again for the purpose of developing mitigation evidence. *Id.* at 17. She testified that she chose not to present the results of that evaluation at sentencing because “[i]t was not at all favorable.” *Id.*

1 “At or before trial, the test to be applied in determining competency must be  
2 whether the defendant has sufficient present ability to consult with his lawyer with a  
3 reasonable degree of rational understanding—and whether he has a rational as well as  
4 factual understanding of the proceedings against him.” *Means v. State*, 103 P.3d 25, 35  
5 (Nev. 2004) (alterations and internal quotation marks removed). With respect to  
6 competency at the time of the crime, “a defendant must be in a delusional state  
7 preventing him from knowing or understanding the nature of his act or from appreciating  
8 the wrongfulness of his act.” *Blake v. State*, 121 P.3d 567, 576 (Nev. 2005); *see also*  
9 NRS 174.035(5) (codifying Nevada's standard for legal insanity). In the absence of any  
10 evidence that he came remotely close to satisfying either of these standards, Costa has  
11 not demonstrated that his counsel was ineffective by not having him individually  
12 evaluated prior to the entry of his guilty plea. Ground 2(5) is denied.

13 Grounds 2(6), 2(7), and 2(8).

14 Costa raises three additional claims in Ground 2, all of which fail to meet the  
15 pleading standard applicable to federal habeas claims. Habeas Rule 2(c) of the Rules  
16 Governing Section 2254 Cases in the United States District Courts imposes a “more  
17 demanding” pleading standard than the notice pleading used for complaints in ordinary  
18 civil cases. *Mayle v. Felix*, 545 U.S. 644, 655 (2005). Under Habeas Rule 2(c), a petition  
19 must “specify all the grounds for relief available to the petitioner [and] state the facts  
20 supporting each ground[; ... and] the petition is expected to state facts that point to a  
21 real possibility of constitutional error.” *Id.*

22 In Ground 2(6), Costa alleges that counsel was ineffective because she advised  
23 him that if he pleaded guilty the prosecution would not seek the weapon enhancement.  
24 In Ground 2(7), he alleges the counsel was ineffective for failing to argue for a fixed  
25 sentence. In Ground 2(8), he alleges that counsel was ineffective for failing “to bring  
26 meritorious claims for review on direct appeal, when such claims existed.” ECF No. 14  
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at 6. Costa does not provide any additional factual allegations to support these bald claims. As such, they must be dismissed under Habeas Rule 2(c).<sup>3</sup>

*Prosecutorial misconduct claim*

Ground 4

In Ground 4, Costa alleges that the prosecutor's statements and conduct at his sentencing hearing constituted a breach of the plea agreement. He contends that the prosecutor had agreed to "stand silent" about the sentence to be imposed under the agreement. ECF No. 14 at 10. He claims that the prosecutor's failure to do so caused the trial judge to depart upwards from the agreed upon sentence.

On direct appeal, the Nevada Supreme Court addressed this claim as follows:

Appellant Jerald Rey Costa, Jr., contends that the State breached his plea agreement because the prosecutor went beyond simply asking the district court to follow the negotiations. We disagree. The State specifically reserved the right to present arguments in support of its recommendation of life with the possibility of parole for the first-degree murder conviction and a concurrent sentence for the battery by a prisoner conviction. Nothing in the prosecutor's comments implicitly or explicitly sought a harsher sentence than the State agreed to recommend. Therefore, we conclude that the prosecutor did not breach the terms or spirit of the plea agreements, see *Sullivan v. State*, 115 Nev. 383, 389-90, 990 P.2d 1258, 1261-62 (1999).

ECF No. 19-49 at 2-3.

"When a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Santobello v. New York*, 404 U.S. 257, 262 (1971). In *Santobello*, the prosecutor recommended a particular sentence even though the State had promised petitioner before the plea was entered that there would be no sentence recommendation by the prosecution. 404 U.S. at 259. The U.S. Supreme Court vacated Santobello's judgment of conviction even though the sentencing judge said he would have imposed the same sentence notwithstanding any breach of the plea agreement.

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<sup>3</sup> Ground 2(6) is meritless on its face because, as noted above, the prosecution agreed not to seek the enhancement.

1 *Id.* at 259-20. In addition, the Court held that it does not matter whether the breach is  
2 inadvertent. *Id.* at 263.

3 In exchange for Costa's guilty plea, the State agreed to not pursue the  
4 sentencing option of life without the possibility of parole or a mandatory consecutive  
5 sentence for use of a deadly weapon. ECF No. 19-18 at 4. The State also agreed to  
6 recommend that Costa's sentence on the battery by a prisoner count run concurrent to  
7 the sentence in his murder case. ECF No. 19-19 at 4

8 At Costa's sentencing hearing, Lunt argued at length about mitigating  
9 circumstances, including physical and sexual abuse Costa had witnessed as a child,  
10 and asked the court to follow the negotiated agreement and not the recommendation of  
11 the Department of Parole and Probation, which was that Costa be sentenced to life  
12 without the possibility of parole for the murder and the maximum term for the battery by  
13 a prisoner. ECF No. 19-21 at 18-39. At the outset of his argument, the prosecutor stated  
14 that the State is in "complete agreement with the plea agreement." *Id.* at 41. However,  
15 he then argued that, while Costa was an alcoholic, the real issue in the case was  
16 "impulse control" and that Costa had been arrested before for having a gun while  
17 intoxicated. *Id.* at 41-42. Lunt objected on the ground that the prosecutor was "getting  
18 close to going beyond" following agreement. *Id.* at 42. The prosecutor denied that he  
19 was "arguing anything," and the judge overruled the objection. *Id.*

20 The prosecutor then questioned Lunt's argument about the abuse Costa had  
21 witnessed because, despite being asked, Costa had not mentioned it to the person who  
22 had compiled the presentence investigation report. *Id.* at 42-43. The prosecutor also  
23 noted that, despite Costa having a blood-alcohol level of .17 at the time of his arrest, he  
24 "wasn't too drunk to run away" and that he appeared to have hid the gun he used to  
25 shoot Pulice. *Id.* at 43. At that point, Lunt again objected on the ground that the  
26 prosecutor was going beyond following the negotiations. *Id.* at 43-44. She also pointed  
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1 out that gun had been found lying on its side, not hidden, and that Costa had said that  
2 he lost it while running. *Id.* at 44.

3 The judge noted that Lunt's claim regarding the gun was supported by the  
4 presentence investigation report and admonished the prosecutor to confine his  
5 comments to the negotiation. *Id.* The prosecutor responded by denying that he had said  
6 anything wrong. *Id.* The judge then explained that defense counsel's concern was that  
7 he was arguing aggravating factors by asserting that the murder was premeditated, that  
8 Costa had hid the weapon, and that Costa was not that drunk. *Id.* at 44-45. The  
9 prosecutor then discussed the battery case and asked that Costa receive a 24 to 60-  
10 month term (less than the maximum) to run concurrent with the sentence on the murder  
11 charge. *Id.* at 45-46.

12 The judge followed the negotiation with respect to the murder charge and  
13 imposed a sentence of life with the possibility of parole after 20 years has been served.  
14 *Id.* at 62-66. The judge then sentenced Costa to a maximum term of 24 to 72 months on  
15 the battery charge to run consecutive to the sentence on the murder charge. *Id.* at 66.

16 The Nevada Supreme Court's decision to deny relief was not an "unreasonable  
17 application" of Supreme Court precedents, 28 U.S.C. § 2254(d)(1), nor an  
18 "unreasonable determination of the facts" based on the trial court record, *id.*  
19 § 2254(d)(2). The case the Nevada Supreme Court cited to support its analysis was a  
20 case in which it had cited *Santobello* and correctly identified the governing federal law  
21 standard. See *Sullivan*, 990 P.2d at 1260-62. It matters not whether this court considers  
22 the state court's decision under § 2254(d)(1) or § 2254(d)(2) because the same "clearly  
23 erroneous" standard is used for both determinations. See *Gunn v. Ignacio*, 263 F.3d  
24 965, 969 (9th Cir. 2001). Based on the record before this court, the state court's  
25 adjudication did not result in a decision that meets that standard.

1 Despite Costa's allegation to the contrary, the prosecutor did not agree to "stand  
2 silent" about the sentence to be imposed. Instead, Costa's guilty plea memorandum  
3 included the following provision:

4 I understand that, even though the State and I have reached this  
5 plea agreement, the State is reserving the right to present arguments,  
6 facts, and/or witnesses at sentencing in support of the plea agreement.

7 ECF No. 19-18 at 4. It is not unreasonable to conclude that the prosecutor was merely  
8 attempting to demonstrate why the first-degree murder charge was warranted and why  
9 a 20-year to life sentence was the appropriate punishment as opposed to a 20 to 50-  
10 year sentence, the other available sentencing option in addition to life without the  
11 possibility of parole. The state court's decision was objectively reasonable, and this  
12 court must defer to that decision under § 2254(d). Ground 4 is denied.

#### 12 **IV. CONCLUSION**

13 For the reasons set forth above, Costa is not entitled to habeas relief.

#### 14 *Certificate of Appealability*

15 Because this is a final order adverse to the petitioner, Rule 11 of the Rules  
16 Governing Section 2254 Cases requires this court to issue or deny a certificate of  
17 appealability (COA). Accordingly, the court has *sua sponte* evaluated the claims within  
18 the petition for suitability for the issuance of a COA. See 28 U.S.C. § 2253(c); *Turner v.*  
19 *Calderon*, 281 F.3d 851, 864-65 (9th Cir. 2002).


20 Pursuant to 28 U.S.C. § 2253(c)(2), a COA may issue only when the petitioner  
21 "has made a substantial showing of the denial of a constitutional right." With respect to  
22 claims rejected on the merits, a petitioner "must demonstrate that reasonable jurists  
23 would find the district court's assessment of the constitutional claims debatable or  
24 wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (citing *Barefoot v. Estelle*, 463  
25 U.S. 880, 893 & n.4 (1983)). For procedural rulings, a COA will issue only if reasonable  
26 jurists could debate (1) whether the petition states a valid claim of the denial of a  
27 constitutional right and (2) whether the court's procedural ruling was correct. *Id.*  
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1 Having reviewed its determinations and rulings in adjudicating Costa's petition,  
2 the court finds that none of those rulings meets the *Slack* standard. The court therefore  
3 declines to issue a certificate of appealability for its resolution of any of Costa's claims.

4 **IT IS THEREFORE ORDERED** that Costa's amended petition for writ of habeas  
5 corpus (ECF No. 14) is DENIED. The Clerk shall enter judgment accordingly and close  
6 this case.

7 **IT IS FURTHER ORDERED** that a COA is DENIED.

8 DATED this 28th day of May, 2025.

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10 UNITED STATES DISTRICT JUDGE  
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